IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

**No. 1280**

**VAIL MANUFACTURING COMPANY,**
Petitioner,

vs.

**NATIONAL LABOR RELATIONS BOARD,**
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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VAIL MANUFACTURING COMPANY,
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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Supreme Court of the United States:*

Your petitioner, Vail Manufacturing Company, an Illinois corporation, respectfully represents and shows to this Honorable Court that it seeks a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit granting a petition for enforcement of an order of the National Labor Relations Board.

## STATEMENT OF MATTER INVOLVED.

The respondent, National Labor Relations Board, issued its decision and order dated March 31, 1945 (R. 9-19) and upon petitioner's not complying therewith, respondent filed its petition for enforcement of the order with the Circuit Court of Appeals for the Seventh Circuit (R. 1-7).

The said court filed its opinion and decision granting the petition and affirming the board's order (R. 212-216). Following denial of petition for rehearing, the court of appeals entered its decree of January 25, 1947 enforcing the order of the board (R. 218-222).

## The Facts.

On the assumption that the employer in discharging two foremen, Joseph Mastik and Frank Mastik, violated rights guaranteed to them under Sections 8(1) and 8(3) of the National Labor Relations Act, the court below ordered reinstatement of the said employees with back pay. The review here sought is of that portion of the decision that ordered reinstatement with back pay of the aforesaid employees.

Although petitioner contended before the board that said employees were machine operators who were eligible to participate in union activities covering non-supervisory employees, the board found that they were in fact foremen and therefore not eligible to participate in said election (R. 11). The board also ruled against petitioner's contention that said employees did not quit petitioner's employment but were discharged for their refusal to be classified by petitioner as non-supervisory employees in order to swell the anti-union vote (R. 51-53, 125-126). Petitioner renewed its contention before the court of appeals, but the said court affirmed the board's finding and ordered reinstatement of said employees with back pay.

It is admitted that neither employee was in any way interested in the union nor in exercising any rights available to them under Sections 8(1) and 8(3) of the National Labor Relations Act (R. 169).

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The United States Circuit Court of Appeals for the Seventh Circuit "has decided an important question of federal law which has not been, but should be, settled by this court" (Sup. Ct. Rule 38 (5) (b)).

2. The decision in this case is of wide public interest and of concern to every type of industry that employs foremen and higher grades of managerial personnel. The decision of the lower court sanctions the exercise of management functions by the board by dictating the tenure of employment when the same is deemed by the board to be inconsistent with the interests of rank and file employees who claim rights under the National Labor Relations Act.

3. The Court of Appeals committed error in approving the finding that petitioner in discharging the aforesaid employees was guilty of violating Section 8(1) of the Act:

(a) The said employees did not attempt to exercise, nor could they have exercised, any rights guaranteed under Section 8(1) of the Act as they were in fact foremen and not members of the unit eligible to select a bargaining agent.

(b) The order directing reinstatement and back pay was predicated upon a denial of rights guaranteed by Section 8(1) which contemplates injury resulting from such denial. Since no rights were safeguarded to *these employees,* no recovery could be had under Section 10(c) of the Act.

4. The Court of Appeals committed error in affirming the board's finding that petitioner violated Section 8(3) of the Act thereby entitling said employees to reinstatement with back pay. Said employees could not have become members of the union representing rank and file employees. Petitioner's treatment of said employees could neither have encouraged nor discouraged their joining the union here involved. Therefore no violation of Section 8(3) *as to them* was involved.

5. The Court of Appeals committed error in ordering reinstatement with back pay to said foremen whom the board had previously ruled ineligible to participate in the activities of the rank and file, and who therefore were denied no rights under the Act.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination, a full and complete transcript of the record and of the proceedings in the cause entered on its docket as No. 9107 entitled *National Labor Relations Board, Petitioner* v. *Vail Manufacturing Company, Respondent,* and that the said decree of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court shall seem just.

Respectfully submitted,

FRANKLIN D. TRUEBLOOD,
Counsel for Petitioner.

KENNETH G. SPAULDING,
Of Counsel.

Dated April 16, 1947.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

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**No.**

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VAIL MANUFACTURING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit dated January 2, 1947, is printed in the record (R. 212-216) and is reported in 158 F. (2d) 664 (advance sheets).

### II.

### Statement of Jurisdiction.

Review is sought of the decree of the Circuit Court of Appeals for the Seventh Circuit entered January 25,

1947 (R. 218-222). Jurisdiction of this court is invoked under Section 10 (e) of the National Labor Relations Act and under Section 240 of the Judicial Code, as amended. (United States Code, Title 28, Section 347.)

## III.

### Statement of Case.

A full statement of the case is set forth in the petition.

## IV.

### Specification of Errors.

The United States Circuit Court of Appeals for the Seventh Circuit erred in:

1. Affirming the board's finding that discharge of foremen claiming no rights under Section 8 (1) of the National Labor Relations Act was a violation thereof.

2. Affirming the board's finding that discharge of foremen whom the board had previously ruled ineligible to participate in activities of rank and file employees claiming rights under the Act was a violation of Section 8 (3).

3. In ordering reinstatement and back pay for foremen who were not attempting to exercise rights guaranteed under the Act thereby transferring to the board the prerogative of management to determine hire and tenure of employment of management personnel.

## V.

## ARGUMENT.

### Point A.

### Importance of the Question of Federal Law Involved.

**1. Petitioner submits that this record presents for determination an important question of federal law which has not been, but should be, settled by this court.**

Numerous cases can be cited in which courts have authorized reinstatement and back pay to discharged foremen, but in each of these the order was predicated upon discrimination against the foremen on the ground that they were either members of the union or were attempting to exercise rights guaranteed to them by the National Labor Relations Act. The case at bar is the direct antithesis of these cases.

**2. The determination of the aforesaid question by this court is of the greatest importance to industry generally as well as to corporate officers and foremen.**

The effect of the decision of the lower court is to deprive the employer of the prerogative of management, namely, to hire and to determine the tenure of employment of management personnel, and transfer this function to the National Labor Relations Board.

It has been held repeatedly that Sections 7 and 8 of the Act do not authorize the National Labor Relations Board to interfere with the managerial functions of the employer, nor do they authorize the board to interfere with the right to discharge employees *except* for reasons of union membership, activity or relationship.

*Stonewall Cotton Mills* v. *National Labor Relations Board,* 129 F. (2d) 629, (C.C.A. 5) Cert. denied, 317 U. S. 667.

*Dannen Grain and Milling Co.* v. *National Labor Relations Board,* 130 F. (2d) 321, (C.C.A. 8).

*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1.

*National Labor Relations Board* v. *Automotive Maintenance Machinery Co.,* 116 F. (2d) 350 (C.C.A. 7), rev. on other grounds, 315 U. S. 282.

## Point B.

### The Discharge of the Foremen Was Not a Violation of Section 8 (1) of the National Labor Relations Act.

Section 8 of the Act provides in part:

> "It shall be an unfair labor practice for an employer * * * (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 7 states:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

It is fundamental that before the petitioner could be charged with violating Section 8 (1) of the Act for discharging Frank Mastik and Joseph Mastik, the discharges must have resulted in an interference with their exercise of rights guaranteed thereunder.

Even construing the facts most strongly against petitioner, petitioner discharged these foremen for their failure to agree to a request that they be classified as machine operators instead of foremen, for the purpose of voting against the union.

As the foregoing authorities show, even had these discharges proven to be arbitrary, it would have made no difference. Under the terms of the Act, an employer has the right to discharge an employee for any reason he may deem sufficient, so long as the discharge is not an interference with the employee's union activities and relationship.

Petitioner could not have interfered with the employees' union activities because they had none. The employees were ineligible to vote in the election and had no interest therein (R. 11, 169). They were not attempting to organize, nor assisting any other group to organize, nor bargaining as a separate unit, nor engaging in any correlative activity.

A discharged employee is not entitled to reinstatement under Section 10 (c) of the Act unless the activities in which he was engaged and for which he was discharged are protected by the Act from interference by the employer. If the board could order reinstatement of employees who were not attempting to exercise the rights guaranteed them under Section 7, there would be no logical deterrent to its usurpation of total supervision of the employer's prerogative to hire and determine the tenure of employment of its own officer personnel. As the cases cited show, this would be contrary to established principles of law.

## Point C.

### The Discharge of the Foremen Was Not a Violation of Section 8 (3) of the National Labor Relations Act.

Section 8 provides in part:

> "It shall be an unfair labor practice for an employer * * * (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *"

Applying the facts in this case to the language of Section 8 (3), it is apparent that the discharge of said employees did not constitute an unfair labor practice *as to them* unless the effect of the discharges was to encourage or discourage *their* membership in the labor organization. Obviously the discharges had no such effect; the board found that they were not eligible to vote in the election and had no interest in it (R. 11).

This is not a case in which the board sought to determine whether foremen come within the coverage of the Act; nor is it a case in which foremen took collective action to protect *their own* interests. It is submitted that in order for discharged employees to receive redress under the Act, it must be shown that they sustained injury by an interference with *their* own rights rather than with the rights of *other* employees.

Had these employees carried out petitioner's suggestion that they be classified in the eligible unit, they would have been acting as employers within the meaning of Section 2 (2) of the Act and their actions rightfully would have been attributed to management. The board and lower court assume that in refusing to be classified they were acting as employees rather than as employers and, further, that they were acting as employees *whose*

*interests were protected by the Act.* Projecting such reasoning to its logical conclusion, the right of the employer to manage will be denied, and an employee who is discharged for his refusal to follow the employer's directions will be accorded redress under the Act.

It follows that such an interpretation of the Act would distort its meaning. Should the construction of the Act by the board and the lower court be sustained, the policy-making prerogatives of management will pass to the board. From the foregoing it is submitted that the rule of law enunciated by the lower court should be changed.

## Conclusion.

In conclusion we urge that the Circuit Court of Appeals erred in approving the board's finding that the discharge of the foreman violated Sections 8 (1) and 8 (3) and in granting reinstatement and back pay under Section 10 (c); that said decision is contrary to the meaning and intent of Sections 8 (1) and 8 (3) and has the effect of vesting the managerial functions of hire and tenure of employment in the board.

We therefore respectfully submit that the petition for *certiorari* should be allowed and that the writ should be granted.

Respectfully submitted,

FRANKLIN D. TRUEBLOOD,
Counsel for Petitioner.

KENNETH G. SPAULDING,
DWIGHT W. CROESSMANN,
Of Counsel.

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1280

VAIL MANUFACTURING COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. 212–216) is reported in 158 F. 2d 664. The findings of fact, conclusion of law, and order of the National Labor Relations Board (R. 9–59) are reported in 61 N. L. R. B. 181.

### JURISDICTION

The decree of the court below (R. 218–222) was entered on January 25, 1947. The petition for a writ of certiorari was filed on April 16, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended,

and under Section 10 (e) of the National Labor Relations Act.

## QUESTION PRESENTED

Whether the Board properly determined that an employer violated Section 8 (1) and (3) of the National Labor Relations Act by discharging two supervisory employees because of their refusal to acquiesce in the employer's scheme of classifying them as non-supervisory employees in order to have them vote against a union in an election to be conducted by the Board among non-supervisory employees.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 9.

## STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on March 31, 1945, issued its findings of fact, conclusions of law, and order (R. 8–59). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[1]

The Company's employees began to join the United Steelworkers of America, affiliated with the C. I. O., hereinafter called the Union, during the

[1] In the following statement, the references preceding the the semicolon are to the Board's findings, including the findings of the trial examiner adopted by the Board; succeeding references are to the supporting evidence.

summer and fall of 1943 (R. 23–24; 65–72, 86–87). On November 29, 1943, the Union filed with the Board a petition for investigation and certification seeking to establish its status as collective bargaining representative of the Company's non-supervisory employees (R. 24; 125, 184–185). Between November 29, 1943, and December 4, 1943, the Company engaged in an active campaign to coerce its employees to abandon the Union (R. 10, 25–27; 73–75, 90, 97, 100–102, 105–106, 125, 138–139). As part of this campaign the Company discriminatorily discharged 23 employees because of their membership and activity in the Union (R. 12–14, 28–50, 56–57; 66–68, 71–72, 75, 77–78, 82–85, 90, 91–98, 103–104, 185–186, 187–188, 190–192, 194–198).

On December 4, 1943, Walter Vail, president of the Company (R. 23; 184), at the request of the Board, began compiling a list of employees eligible to vote in the election which the Board might conduct in the representation proceeding initiated by the Union's petition (R. 50; Tr. 505–506). In connection with the compilation of this list, President Vail informed Frank Mastik, who had been in charge of the day shift in the standard staple department for nine years (R. 50; 72, 85, 94–95), and his brother, Joseph Mastik, who had been in charge of the night shift in the same department for four years (R. 50; 73), that in making up the list the Company was classifying them

as day and night operators so that they could vote against the Union (R. 50; 76, 205). Both of the Mastiks had the power effectively to recommend the hiring and discharging of employees (R. 11; 72, 73, 85, 125–126, 188–189).

Over the week-end the Mastiks talked over the Company's proposal and concluded that the other employees would resent the participation of their supervisors in the election (R. 51; 76, 189). Accordingly, on the following Monday, December 6, they informed President Vail that they would not agree to being classified as non-supervisory employees for the purpose of voting in the election, and rather than participate in such a course of action, they would leave the Company's employ (R. 51–54; 76, 189). President Vail thereupon acquiesced in their refusal and listed them on the eligibility list as supervisory employees (R. 51–54; 76, 189–190). However, about five minutes later the Mastiks were summoned back to President Vail's office and discharged (R. 51–54; 76–77, 188, 190). President Vail accompanied them from the plant, saying that he wanted "to see that you do not take anything that belongs to the company" (R. 51; 76–77, 190, Tr. 547). Frank Mastik had worked for the Company since 1922 (R. 50; 72); Joseph, since 1935 (R. 50; 73).

The Board concluded that the Company, by attempting to persuade the Mastiks to consent to classification as non-supervisory employees for the

purpose of voting against the Union in the contemplated Board election, interfered with the rights guaranteed its employees by Section 7 of the Act, thereby committing an unfair labor practice within the meaning of Section 8 (1) of the Act (R. 11, 54). The Board also concluded that the Company, by discharging the Mastiks for refusing to assist it in the commission of an unfair labor practice, violated Section 8 (1) and (3) of the Act (R. 11–12, 54). In answering petitioner's contention that the discharges could not be regarded as violative of Section 8 (3) because they would not discourage membership in the Union, the Board pointed out that (R. 11–12):

> It is a reasonable inference that, in a small plant such as the respondent's, where the employees are aware of the respondent's opposition to the Union, the discharge of supervisory employees for refusing to aid the respondent in its campaign against the Union would come to the attention of the ordinary employees, would cause such employees reasonably to fear that the respondent would take similar action against those who favored the Union, as in fact it did, and would therefore discourage membership in the Union.

The Board further found that "whether the discharges be viewed as violations of Section 8 (1) or of Section 8 (3) of the Act," reinstatement of the Mastiks with back pay "is necessary" in order to effectuate the policies of the Act (R. 12).

Accordingly, the Board by its order directed the Company to cease and desist from its unfair labor practices, to reinstate with back pay the employees discriminatorily discharged, including Frank and Joseph Mastik, and to post appropriate notices (R. 15–17).

The Board filed a petition for enforcement of its order in the court below (R. 1–7), and on January 2, 1947, the court handed down its opinion (R. 212–216) and on January 25, 1947, entered its decree (R. 218–220) enforcing in full the Board's order.

## ARGUMENT

Petitioner's attack upon the validity of the Board's determination that the discharge of the Mastiks violated the Act rests upon the assumption that the discharge could not be unlawful unless it invaded some right secured to the Mastiks by the Act (Pet. 3, 4, 5, 11, 12, 13). The Board, however, found that the discharge of the Mastiks because they would not participate in the Company's efforts to defeat unionization of the non-supervisory employees invaded rights secured to the non-supervisory employees by the Act and was for that reason violative of the Act (R. 11–12). The Board found that the discharge would cause "ordinary" employees "reasonably to fear" that the Company would take "similar action against those who favored the Union" and would thus discourage the non-supervisory employees

from joining the Union (R. 11–12). The Board also found that the discharges interfered with the freedom of non-supervisory employees to join the Union (R. 12). The court below held that these findings were supported by substantial evidence (R. 215–216).

The Circuit Courts of Appeals for the Fifth and the Eighth Circuits have likewise sustained the Board's determinations that the discharge of supervisory employees because they refused to engage in unfair labor practices invaded rights guaranteed to non-supervisory employees by the Act and therefore constituted violations of Section 8 (1) and (3) of the Act. *National Labor Relations Board* v. *Richter's Bakery,* 140 F. 2d 870, 872–873 (C. C. A. 5), certiorari denied, 322 U. S. 754; *Eagle-Picher & Smelting Co.* v. *National Labor Relations Board,* 119 F. 2d 903, 912–913 (C. C. A. 8); cf. *Matter of Ronrico Corp.,* 53 N. L. R. B. 1137, 1169; *Matter of Reliance Mfg. Co.,* 60 N. L. R. B. 946, 950–952, 963–964. Petitioner is mistaken in asserting that in each case where foremen have been ordered reinstated with back pay, "the order was predicated upon discrimination against the foreman on the ground that they were either members of the union or were attempting to exercise rights guaranteed to them by the National Labor Relations Act" (Pet. 9); on the contrary, in none of the foregoing cases was the foreman a member of the union or at-

tempting to exercise any right guaranteed by the Act, unless the right of a supervisor to maintain a neutral position can be said to be a right guaranteed to supervisors by the Act.

### CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decision nor any question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*

GERHARD P. VAN ARKEL,
*General Counsel,*
MORRIS P. GLUSHIEN,
*Associate General Counsel,*
RUTH WEYAND,
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*Attorneys.*
*National Labor Relations Board.*

MAY 1947.

## APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *



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